Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-960

RICHARD E. JOHNSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

ELMER LLOYD WHITMER
Deputy Attorney General

Attorneys for Respondent

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6420

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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STATEMENT OF THE CASE

Petitioner's statement of the case herein is relatively accurate, but respondent would modify that statement as follows:

Petitioner prays for a writ of certiorari herein on the singular reason that petitioner was denied due process of law and equal protection under the 14th Amendment of the Constitution of the United States by the trial court refusing to instruct the jury that a verdict for a lesser included offense could be returned, when in fact lesser included offenses were barred by the statute of limi-

tations of Indiana. Pursuant to Rule 19, petitioner is not entitled to a writ of certiorari, within the discretionary powers of this court because there is no special or important reason therefor and petitioner has not shown that the Supreme Court of Indiana, in affirming petitioner's conviction in the trial court, decided the case herein in a way not in accord with applicable decisions of this court.

ARGUMENT OF RESPONDENT

I. The Indiana Supreme Court determined petitioner (Defendant below) could not be convicted of a lesser included offense within First Degree Murder when such lesser include offenses were barred by the statute of limitations of Indiana and cited *Chaifetz v. U.S.* (1960) C.A., D.C. 288 F.2d 133. This rule is well supported by authorities collected in 47 A.L.R. 2d 888 (1956). Petitioner argues he waived the bar of the statute of limitations by presenting the instructions to the trial court advising the jury they could convict petitioner for a lesser included offense. Petitioner cites no authority in support of this assertion.

II. Petitioner complains of the police and law enforcement authorities failing to "work more expeditiously" and "with dispatch" so that he could have "benefit of a jury that could have convicted him of a lesser offense" and this placed him "in a less favorable position then other defendants solely as a result of the age of the case" and this violated his due process and equal protection rights. Petitioner further states this penalizes him "for events beyond his control". However petitioner does not explain that he left the jurisdiction of Indiana Courts and that it was never beyond his control or ability to surrender himself to authorities so that he could have the protection of conviction of an offense lesser than First Degree Murder. Petitioner's pseudo-logic, without any supporting legal authorities should not be persuasive.

An Indiana statute (IC 35-1-3-5) permits the suspension of the statute of limitations for the period of time a person who has committed an offense is absent from the state of Indiana or conceals himself so that process can-

not be served on him, but petitioner did not attempt to invoke this statute. However, to have done so would have required an amendment of the indictment. *Ulmer v. State* (1859) 14 Ind. 120.

III. Petitioner's reasons in support of his petition are contradictory. After asserting lack of dispatch and failure to focus upon him as a suspect, he refers to "the intensity of law enforcement officials desire to secure a conviction" with an informant as a witness. Also, there is reference to an article from a publication six months after petitioner's trial, said by petitioner to be "an unabashed eulogy of the detective work done in solving the homicide.

The latter, reasons petitioner "may explain, in part, the State's eagerness to retry the case after a hung jury of November 20, 1974. The more important *part,* and legally so, was petitioner's motion to the trial court for a speedy trial under the Indiana rule requiring same within a seventy day limit.

IV. The alleged denial of rights urged by petitioner arises from Indiana statutes and petitioner has failed to show how he is not within the classification of persons affected thereby and thus excluded from the equal protection of these laws. Further, petitioner presents no authority that such rights allegedly denied him are federal constitutional rights.

CONCLUSION

WHEREFORE, the Respondent respectfully moves the Court to deny this petition for a writ of certiorari and affirm the decision entered in this cause, *Johnson v. State of Indiana,* 355 N.E.2d 240, by the Indiana Supreme Court; and for all other proper relief in the premises.

Respectively submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

ELMER LLOYD WHITMER
Deputy Attorney General

Attorneys for Respondent

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Indianapolis, Indiana 46204
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